IN THE COURT OF COMMON PLEAS OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STEVE GROOVER,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**C.A. No.: 2004-11-349**
	)	
OYEDELE OGUNYEMI and LAPO OGUNYEMI,	)	
	)	
	)	
Defendants,	)	
	)	
	)	

Submitted: August 10, 2006
Decided: September 5, 2006

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This *de novo* appeal of a Rule 16.1 Arbitration Hearing arises from a breach of contract and fraud action involving an online eBay sale wherein plaintiff Steve Groover (hereinafter "Groover"), a resident of Birmingham, Alabama, purchased a 1999 Toyota Land Cruiser (the "vehicle") from defendants[1] Oyedele and Lapo Ogunyemi (hereinafter the "Ogunyemis"), residents of Delaware at the time of the transaction. The purchase price for the vehicle was $21,100.00. Both the Ogunyemis' online advertisement and oral representations indicated that the vehicle was in superior condition. Upon receipt, Groover claims the exterior and interior of the vehicle were, in fact, in dire condition.

[1] The Court notes at the outset that this Opinion is based on a record consisting of plaintiff's oral sworn testimony and ten admitted exhibits. Although defendants Answered via their attorney, they did not appear at trial, did not present any sworn testimony, and did not plead or defend their position.

After unsuccessful attempts to obtain a refund and return the vehicle to the Ogunyemis, Groover filed the instant Complaint with this Court claiming that the Ogunyemis 1) misrepresented the condition of the vehicle; 2) were fraudulent in the inducement and in the performance; 3) committed a breach of express warranty, 6 Del. C. §2-313; 4) breached the implied warranty of merchantability, 6 Del. C. §2-314; and/or the implied warranty of fitness for a particular purpose, 6 Del. C. §2-315. Groover seeks reimbursement for the $21,100.00 purchase price, plus consequential damages including loss of use and storage costs, punitive damages for the misrepresentation and fraud, plus court costs, and pre- and post-judgment interest at the legal rate. In their Answer, the Ogunyemis denied all claims raised by Groover.

At the Rule 16.1 Arbitration Hearing, the arbitrator found in favor of Groover. The Ogunyemis subsequently filed this *de novo* appeal in this Court. Trial took place on August 10, 2006 and after receipt of the evidence and conclusion of testimony, the Court reserved decision. This is the Court's final decision and order.

FACTS

The Court finds the relevant facts as follows. At trial, Groover was sworn and testified as plaintiff's first and only witness.[2] According to Groover, in July, 2004 he found an online advertisement on the eBay website[3] for a 1999 Toyota Land Cruiser. The advertisement stated that the vehicle had "absolutely no problems;" that the paint was "still shiny like new;" with the leather interior "in superb condition;" and with "no

[2] Counsel for the Ogunyemis represented to the Court that neither of his clients were able to appear, having moved to Kentucky the week before trial, however defense counsel had the opportunity to, and did, cross-examine Groover.
[3] http://www.ebay.com

tears and light wrinkle, there are no stains or signs of excessive wear."[4] Also contained in the advertisement by defendant on E-Bay was a telephone number, which Groover testified calling, and speaking with the Ogunyemis at length regarding the condition of the vehicle. Although Groover admitted he testified that he decided to nonetheless place a bid on the vehicle based on the representations made to him by the Ogunyemis, both in the online advertisement and during their telephone conversations. Upon winning the bid, and per the terms of the eBay advertisement, Groover paid the required $1,500.00 deposit online using PayPal, a secure online payment system, on July 7, 2004.[5] Accompanying the deposit, Groover added a note on the online form in the "Note" section of the deposit form (the "addendum"). In his addendum, Gruver stated that he did not personally inspect the vehicle, but that he relied on the representations made by the Ogunyemis in the advertisement. In this addendum, Groover integrated portions of a telephone conversation he testified having with the Ogunyemis:

> "Verbal description 07/06/04: Paint: 1 scratch on passenger door, otherwise shiny like new. Tires: New condition. Glass: No scratches or chips. Interior Carpet/ / Mats / Trim: Good condition, no stains or wear. Interior Leather / Dash / Door Panels: Good condition, no stains or wear. Title: released with settlement of lien. Explanation of vehicle accident report 05/26/00 – Vehicle struck another vehicle while backing up. Bumper cover received paint damage as a result."[6]

Groover also added the following summary:

> "Summary:
> Upon delivery of this vehicle, a 1999 Toyota Land Cruiser, VIN# JT3HT05J6X0029044, with exception of the cosmetic flaws listed above, the vehicle is in good mechanical and aesthetic condition, free of rust, excessive wear, or any condition which would diminish the overall life of the vehicle and with all features / systems functioning properly."[7]

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[4] Plaintiff's Ex.: No. 1, Defendants' July, 2004, eBay Listing re: 1999 Toyota Land Cruiser
[5] Plaintiff's Ex. No.: 2, $1,500 "Down Payment" Receipt and "Note" Written by Plaintiff re: Purchase of 1999 Toyota Land Cruiser from Defendants
[6] *Id.*
[7] *Id*.

Groover further testified that he printed a "Bill of Sale" form from the internet, which both parties signed.[8] The form provides:

> "**DISCLAIMER OF ALL OTHER WARRANTIES**. OTHER THAN THE SELLER'S WARRANTY OF OWNERSHIP STATED ABOVE, THE BUYER TAKES THE VEHICLE 'AS-IS' WITHOUT ANY WARRANTIES, EXPRESS OR IMPLIED, AS TO ITS CONDITION. THE BUYER HAS PERSONALLY INSPECTED THE VEHICLE AND ACCEPTS IT 'AS-IS'"[9]

On July 8, 2004, Groover issued a check to defendants for the remaining balance of $19,600.00.[10] Co-defendants Ogunyemis made arrangements for the vehicle to be delivered from Delaware to Alabama for a price of $875.00, which Groover paid.[11]

Upon receiving the vehicle towards the end of July, 2004, Groover testified he was "shocked" at its condition. Groover took approximately sixty-six photographs of the extensive damage, including substantial rust on the undercarriage, numerous dents and paint chipping on the exterior, stains on the carpet underneath the floor mats, torn leather behind both passenger seats, torn netting in the trunk of the vehicle, damaged leather on the head rests, as well as duct taping and stains near one of the window controls. Groover contacted the Ogunyemis via telephone and email[12], complaining about the condition of the vehicle and requesting that they pay for return delivery back to Delaware, and demanded a refund. After several unsuccessful attempts, Groover

[8] Plaintiff's Ex. No.: 3, "Bill of Sale" re: Plaintiff's Purchase of 199 Toyota Land Cruiser from Defendants
[9] *Id.*
[10] *Id*.
[11] Plaintiff's Ex. No.: 6, $875 Invoice/Receipt re: Shipment of 1999 Toyota Land Cruiser to Plaintiff in Alabama
[12] Plaintiff's Ex. No.: 8, Approximately 66 Color Photographs of 1999 Toyota Land Cruiser Following Purchase and Receipt by Plaintiff

instituted legal proceedings against the Ogunyemis. Groover further testified that he has kept the vehicle in storage in Alabama since August 7, 2004.[13]

Defense counsel cross-examined Groover, inquiring into Plaintiff's Exhibit No.: 3, the Bill of Sale. In particular, he questioned Groover as to why he signed a document which stated that Groover had personally inspected the vehicle and was accepting it "as-is." In response, Groover testified that the Bill of Sale form was a "fill-in-the-blank Bill of Sale form" that he printed from a website. Furthermore, Groover stated that he was aware that he signed it notwithstanding the fact that he had never personally inspected the vehicle.[14]

In closing, counsel for plaintiffs argued that the Ogunyemis engaged in a fraudulent misrepresentation on the condition of the vehicle, thereby inducing Groover's reliance thereon when he subsequently purchased the vehicle from the Ogunyemis. Defense counsel argued that the Bill of Sale specifically disclaimed all warranties, express and implied, and that the Ogunyemis never intended to induce Groover's actions, and that Groover had ample opportunity to inspect the vehicle, but failed to do so. Additionally, defense counsel noted that Groover nonetheless had a duty to mitigate damages and has not done so by choosing to place the vehicle in storage.

[13] Plaintiff's Ex. No.: 9, 9/23/04 – 7/23/06 Credit Card Statements of Plaintiff Showing Storage Costs Incurred to Date of 199 Toyota Land Cruiser

[14] Defense counsel also questioned Groover about the charge for monthly storage costs, inquiring as to why Groover had chosen to keep the vehicle in storage instead of in a garage at Groover's residence, to which Groover replied having no space in his own garage, as it contains other vehicles owned by Groover. When cross-examined about the rust under the vehicle, defense counsel made painstaking attempts to point out that Groover is not "an expert on rust in Delaware," and Groover indicated that in his lay opinion, that generally, he knows that rust can cause potentially serious problems if present on a vehicle.

ANALYSIS

A preponderance of the evidence exists when the body of evidence supporting a conclusion is greater than the body of evidence that does not support that conclusion. *Reynolds v. Reynolds,* 237 A.2d 708, 711 (Del.1967). To state a claim for common law fraud and/or misrepresentation, the plaintiff must plead facts supporting an inference that: (1) the defendants falsely represented or omitted facts that the defendant had a duty to disclose; (2) the defendants knew or believed that the representation was false or made the representation with a reckless indifference to the truth; (3) the defendants intended to induce the plaintiff to act or refrain from acting; (4) the plaintiff acted in justifiable reliance on the representation; and (5) the plaintiff was injured by its reliance. *Abry Partners V, L.P. v. F & W Acquisition LLC,* 891 A.2d 1032, 1050 (Del.Ch. Feb.14, 2006) (citing *DCV Holdings, Inc. v. Conagra, Inc.,* 889 A.2d 954, 958 (Del.2005)); *Stephenson v. Capano Dev., Inc.,* 462 A.2d 1069, 1074 (Del.1983). As to other counts in the instant complaint, the Court finds plaintiff did not meet its burden proof by a preponderance of the evidence

As to the issue of punitive damages sought by plaintiff, case law provides that "…[p]unitive damages may be awarded where fraud is 'gross, oppressive, or aggravated' or where it involved a breach of trust or confidence." *Robert T. Wirt and Maureen S. Wirt v. William A. Matthews, et. al*, 2002 Del. C.P. Lexis 16(April 9, 2002); *E.I. DuPont v. Florida Evergreen Foliage*, Del. Supr., 744 A. 2d. 457 (1999). "Punitive damages are intended to serve a dual purpose – to punish the wrong doer and to deter him and others from similar conduct." *Strauss v. Biggs*, Del. Supr., 525 A.2d. 992 (1987); *Jardel Co. v. Hughes*, 523 A.2d. 518-529. Under the facts of the case presented at trial clearly co-

defendants conduct outlined above in the Statement of Facts met this standard by a preponderance of the evidence. Co-defendants' contract outlined in the trial, the conduct of co-defendants was clearly "gross, oppressive, and aggravated." By filing a false advertisement on the internet to the public, co-defendants clearly breached the public's trust and confidence. An award of punitive damages is clearly mandated by the trial record because of co-defendants' conduct.

DECISION AND ORDER

After careful review and examination of the trial record[15], the Court hereby concludes that Groover has shown, by a preponderance of the evidence, the elements of common law fraud and misrepresentation. It is clear that the Ogunyemis were the only individuals in a position to make any representations whatsoever regarding the condition of the vehicle. While Groover had opportunity to inspect the vehicle, however, this in no way excuses or permits an individual selling commercial goods to publish an advertisement that purposefully misrepresents or omits information which others are likely to rely upon. Based on the sixty-six photographs and testimony presented during plaintiff's case-in-chief, and keeping in mind that the Court has no other evidence or testimony to weigh it against, the Court finds that Groover has presented evidence sufficient to show, by a preponderance of the evidence, that the Ogunyemis falsely mis-represented the condition of the vehicle; and/or omitted information regarding its actual condition which they had a duty to disclose, and that the false representations and/or omissions were made, at the very least, with a "reckless indifference to the truth." *See Abry Partners V, L.P. v. F & W Acquisition LLC,* 891 A.2d 1032, 1050 (Del.Ch.

[15] The Court notes that this is a case regarding a somewhat novel are of law to the Court, as it is an internet transaction and purchase. However, the Court is in an appropriate position to arrive at its conclusions, as the claims and issues are nonetheless rooted in traditional legal principles and theories.

Feb.14, 2006) (citing *DCV Holdings, Inc. v. Conagra, Inc.,* 889 A.2d 954, 958 (Del.2005)); *Stephenson v. Capano Dev., Inc.,* 462 A.2d 1069, 1074 (Del.1983).

Defense counsel opted to present no evidence in co-defendants' defense. Thus, the Court is placed in the position of relying solely on the evidence presented by Groover and that brought out on cross-examination. Therefore, using a preponderance of the evidence standard, the evidence presented by plaintiff shows that by placing the advertisement on the eBay website, the Ogunyemis clearly intended to induce others to rely on the representations contained in the advertisement itself. This, of course, is the entire purpose and point of advertising an item on eBay in the first place. Based on the information the Ogunyemis provided to Groover, he paid the deposit, the balance of the purchase price, as well as for delivery of the vehicle from Delaware to Birmingham, Alabama.

Defense counsel correctly points out that basic contract theory imposes upon an injured plaintiff a duty to mitigate damages.[16] However, the Court finds that in this particular instance, where a plaintiff is unsuccessful in his communication with defendant, and where legal action is pending surrounding the item in dispute, it is not unreasonable to preserve the goods in a proper storage facility in the event any party or person involved in the litigation is inclined to inspect its condition. To store the vehicle in a personal garage, as implied by defense counsel on cross-examination of Groover, would raise doubt as to the time frame of when the damage may have occurred. Here, Groover has presented evidence in the form of credit card statements which reflect that the vehicle has remained in storage from shortly after he purchased it from the

[16] *Lowe v. Bennett,* 1994 WL 750375, (Del.Super.)

Ogunyemis. Thus, the Court finds defense counsel's argument regarding the duty to mitigate without merit.

The Court has also scrutinized the trial record and evidence and finds plaintiff has not proven all elements of 6 *Del.C.* §2-313; 6 *Del.C.* §2-314 and 6 *Del.C.* §2-315 by a preponderance of the evidence. The Court incorporates all the findings outlined above in the trial record to support these legal conclusions that the sections dealing with warranty testimony were not proven by a preponderance of the evidence. The Court, in part, bases this conclusion on the fact that co-defendants were not merchants regularly dealing with the sale of motor vehicles, new or used. Nor were the remaining elements of these statutes proven by a preponderance of the evidence.

For the reasons stated herein, the Court finds in favor of plaintiff Groover and against defendants, the Ogunyemis, in the amount of $30,253.75 jointly and severally which includes the sale price, transportation, incidental costs, and interest plus $1,000.00 in punitive damages for a total of $31,253.75, pre- and post-judgment interest at the legal rate, 6 *Del. C.* §2301 *et seq.* and court costs. Upon application by plaintiff's counsel the Court shall schedule an inquisition hearing pursuant to C.C.P. Civ. R. 55 for consequential damages for storage costs and loss of use. No attorney's fees claim has been sought by the plaintiff and that issue is not therefore before the Court.

IT IS SO ORDERED this 5th day of September, 2006.

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John K. Welch
Judge

cc: Rebecca A. Dutton, Case Processor
Civil Division